Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service	)	Report to Congress

COMMENTS

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COMMENTS

BellSouth Corporation, on behalf of itself and its affiliated companies, ("BellSouth") hereby submits its Comments in response to the FCC's Public Notice requesting comments in connection with the Report to Congress on Universal Service which the Commission is required to make.[1]

Under the requirements established by Congress, the Commission is to undertake a review of its implementation of the universal service provisions of the Telecommunications Act of 1996 ("the Act") and report to Congress no later than April 10, 1998. The Commission is directed to report on the extent to which its interpretation in five areas is consistent with the plain language of the statute. To assist the Commission in formulating its report, the Common Carrier Bureau has solicited comment in these five areas. BellSouth provides its comments on each of these issues below.

1. The Definitions Of Information Service, Local Exchange Carrier, Telecommunications, Telecommunications Service, Telecommunications Carrier And Telephone Exchange Service In Section 3 Of The Act, And The Impact Of The Interpretation Of Those Definitions On The Provision Of Universal Service To Consumers In All Areas Of The Nation

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[1] Common Carrier Bureau Seeks Comment for Report to Congress on Universal Service Under the Telecommunications Act of 1996, CC Docket No. 96-45 (Report to Congress), Public Notice, released January 5, 1998 (hereinafter "Public Notice").

Section 254 of the Act clearly delineates the requirements associated with universal service. With regard to the definitions identified in issue 1, their relevance turns on the scope of support envisioned and required by Section 254. Thus, Section 254 defines universal service as an "evolving level of telecommunications services."[2] The definitions in Section 153 dovetail with the universal service definition. Hence, determination of the services eligible for support are circumscribed by the statute's general definitions.

In making its determination regarding the services eligible for high cost universal service support, the Commission strictly construed the statutory framework and followed the parameters set forth in the statute. The Commission expressly limited supported services to those that are consistent with the statute's definition of telecommunications services. It rejected bids to include information and enhanced services which use telecommunications services within the scope of supported universal services, finding that such mixed and hybrid services are not telecommunications services. For example, while the ability to access emergency services such as 911 and E-911 through the use of universal service is supported, the underlying emergency services are not supported. The Commission found that the telecommunications network is only a single component of such emergency services and thus concluded that both 911 and E-911 services "include information service components that cannot be supported under section

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[2] 47 U.S.C. § 254(c)(1).

254(c)(1)."[3] Similarly, the Commission found that the information component of internet access could not be supported under Section 254(c)(1).[4]

Thus, with respect to universal service support for insular, rural and high cost areas, the Commission closely followed the statute. The Commission did not interpret these definitions in a manner that either expanded or contracted the definition of telecommunications services, and accordingly, the services eligible for universal service support are consistent with the statute's definitions. As discussed below, however, the Commission was far more expansive in its interpretations with regard to universal service support for educational institutions, libraries and health care providers and as a result departs from the plain language of the Act.

2. The Application Of Those Definitions To Mixed Or Hybrid Services And The Impact Of Such Application On Universal Service, And The Consistency Of The Commission's Application Of Those Definitions, Including With Respect To Internet Access For Educational Providers, Libraries, And Rural Health Care Providers Under Section 254(h)

As noted above, the Act defines universal service as an "evolving set of telecommunications services." Under this umbrella definition are three subsets of telecommunications services: telecommunications services provided to consumers in insular, rural and high cost areas; telecommunications services provided to educational institutions and libraries; and telecommunications services provided to health care providers. The plain language of the Act contemplates that different telecommunications services may be in each of these

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[3] *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8817 ("*Universal Service Order*").

[4] *Id.* at ¶ 83.

subsets. Thus, the Act authorizes the Commission to designate additional services eligible for support for schools, libraries and health care providers.[5]

In acting on this authorization the Commission has included non-telecommunications services as additional services to be supported by the universal service fund. In so doing, the Commission has departed from the plain language of the Act and hence, creates a framework that is neither contemplated nor authorized by the statute's express provisions or definitions.

Despite the fact that the Commission's authority under Section 254(c)(3) refers to services in addition to those specified in Section 254(c)(1) and that Section 254(c)(1) expressly limits universal service to telecommunications services, the Commission's Universal Service Order interprets Section 254(c)(3) to be without limitation on the services that can be supported by a universal service mechanism for schools, libraries and health care providers. Regardless of the fact that the authorization to specify additional services for support for schools, libraries and health care providers is for the purposes of implementing subsection (h) of Section 254 and that Section 254(h) is entitled "Telecommunications Services for Certain Providers," the Commission does not view subsection (h) as being limited to telecommunications services.

Simply, the Commission's order has taken out of context the single term "services" and has made an unwarranted assumption that it refers to a broad class of services beyond telecommunications services, at least for educational institutions and libraries.[6] This broad class

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[5] 47 U.S.C. § 254(c)(3).

[6] The Commission acknowledged that Section 254(h)(1)(A) expressly limits the services provided to health care service providers to telecommunications services. The Commission, however, believes that Section 254(h)(1)(B), which pertains to eligible services provided by telecommunications carriers to educational institutions, is not so limited because the term service is not modified by the word telecommunications. The Commission's interpretation, however, (Footnote Continued.....)

of services includes internet services and virtually any other non-telecommunication service that the Commission designates.[7] The absurd result of this improper interpretation is that there is virtually no limitation upon the types of services that could be designated as eligible for universal service support. Further misinterpreting the statute, the Commission's order includes customer premises equipment, such as routers and hubs, within the subset of "services" to be supported. Even if the Commission were correct that the statute included non-telecommunications services as eligible for support, which it does not, customer premises equipment is not a service and nothing within the plain language of the statute authorizes support for such equipment.

Further, the Commission interprets identical phrases within the statute inconsistently. It interprets the phrase "access to advanced telecommunications and information services" with respect to universal service for insular, rural and high costs areas as referring only to the telecommunications services that would permit access to such advanced telecommunications and information services.[8] With respect to services to be supported for educational institutions, the Commission interprets the same phrase as authority to support inside connections which are not telecommunications services. Such inconsistencies cannot be reconciled with a plain reading of the statute.

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does not comport with the statute's definition of telecommunications carrier which defines the term as "any provider of telecommunications services" (47 U.S.C. §153(44)). *Universal Service Order* at 9010.

[7] The price of the internet service, however, also includes telecommunications components that are provided to the internet provider. Hence, under the Commission's order, telecommunications services provided to the internet provider are supported. Nothing in the Act provides for such support.

[8] *Universal Service Order* at 8822.

3. Who Is Required To Contribute To Universal Service Under Section 254(d) Of The Act And Related Existing Federal Universal Service Support Mechanisms, And Of Any Exemption Of Providers Or Exclusion Of Any Service That Includes Telecommunications From Such Requirement Or Support Mechanisms

In the *Fourth Order on Reconsideration* the Commission clarified and amended its rules regarding contributions to the federal universal service fund for both telecommunications carriers and non-carrier telecommunication providers.[9] While it may appear that the new rules are compliant with the provisions of Section 254(d), a closer examination shows that the new rules treat carriers and non-carriers differently, without any apparent justification. The result is that the rules are neither non-discriminatory nor equitable.

Specifically, the *Fourth Order on Reconsideration* addressed *de minimus* exemptions for non-carrier systems integrators and for telecommunications carriers. With respect to systems integrators, the Commission concluded that system integrators that received a *de minimus* amount of their revenues from the resale of telecommunications services do not significantly compete with common carriers. Thus, the Commission exempted system integrators that derive less than five percent of their total system integration revenues from filing a universal service worksheet and from contributing to the universal service fund.[10] The Commission concluded

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[9] *In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, and Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing End User Common Line Charge, CC Docket Nos. 96-262, 94-1, 91-213, 95-72,* Fourth Report and Order On Reconsideration in CC Docket No. 96-45 and Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, released December 30, 1997 ("*Fourth Order on Reconsideration*").

[10] *Fourth Order on Reconsideration* at ¶ 280.

that its limited exclusion would ensure that systems integrators do not receive an unfair competitive advantage over common carriers.[11]

With regard to telecommunications carriers, the Commission modified its definition of *de minimus*, concluding that the *de minimus* threshold should be increased to $10,000.[12] Accordingly, carriers that have a contribution of $10,000 or less are exempt from filing a universal service worksheet or contributing to the universal service fund. By increasing the threshold, the Commission intended to reduce the burden on small entities.[13]

It is obvious that by using different *de minimus* definitions, the Commission's rules have disparate impacts, depending on whether a telecommunications provider is classified as a carrier or not. Non-carrier systems integrators can derive telecommunications revenues that would otherwise result in a universal service contribution in excess of $10,000 and still be exempt from universal service reporting and contribution obligations simply if their telecommunications revenue are less than 5 percent of total revenues. These same entities compete against small carriers. Yet, if these small carriers have $10,001 in universal service contributions they would be fully subject to the universal service contribution and reporting requirements. Such disparate treatment is not equitable, non-discriminatory or competitively neutral. Accordingly, the public interest is not served by such dual standards.

Additionally, the new *de minimus* standard changes the treatment of the revenues of resellers that are subject to the *de minimus* exemption. Such revenues would be considered end

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11 *Id.*

12 *Id.* at ¶ 297.

13 *Id.*

user revenues of the underlying carrier. This reclassification of revenues is not competitively neutral, because the Commission is shifting the reseller's obligation to the universal service fund to the underlying carrier. If the Commission wants to exempt certain resellers from contributing to the federal universal service fund, it should do so in a non-discriminatory, competitively neutral manner. To assure a competitively neutral approach, the Commission should have spread the contributions that exempt carriers would have made to the universal service fund across all contributing carriers, not just the carriers whose services are being resold.

4. Who Is Eligible Under Sections 254(e), 254(h)(1) And 254(h)(2) Of The Act To Receive Specific Federal Universal Service Support For The Provision Of Universal Service, and The Consistency With Which The Commission Has Interpreted Each of Those Provisions Of Section 254

The statute explicitly provides that telecommunications carriers are eligible to receive support for the provision of universal service. Section 254(e) specifically limits Federal universal service support to carriers that have been designated eligible carriers under Section 214(e). Section 214(e) authorizes state commissions to designate telecommunications carriers as eligible for receiving universal service support from the mechanisms established under Section 254. In addition, Section 254(h)(1) authorizes telecommunications carriers to be reimbursed for services provided at a discount to rural health care providers. Section 254(h)(1) also authorizes reimbursement for telecommunications carriers providing designated services to educational institutions and libraries. There is nothing in the language of Section 254(h)(2) that addresses universal service support.

Notwithstanding the plain language of the Act, the Commission nonetheless believes that it has the implied authority to extend universal service support to non-carriers that provide designated non-telecommunications services to educational institutions and libraries. Any claim

of implied authority, however, cannot be inconsistent with express provisions of the Act. The fact that the express language of Section 254 limits universal service support to telecommunications carriers defeats any claim of implied authority. Hence, the Commission's interpretation of the Act cannot be reconciled with plain language of the statute.

Further, even to the extent that the Commission has limited support to telecommunications carriers, such as in the instance of support for rural, insular and high cost areas, the Commission has not done so in a competitively neutral manner. Thus, while incumbent local exchange carriers offer designated universal services on an unbundled basis, the Commission failed to establish a requirement that competitive carriers likewise offer core universal services on a stand-alone basis. Accordingly, such carriers can bundle universal services with other discretionary services and thereby avoid having to serve customers that only use basic telephone services.

Having adopted competitive neutrality as a principle of universal service, the Commission under its Section 254 obligations should create rules that operate in a competitively neutral manner. To maintain rules that are not competitively neutral conflicts with Congress' admonition in Section 254 to adopt universal service policies that reflect the principles enumerated in the statute as expanded by the Commission in the *Universal Service Order*.

5. The Commission's Decisions Regarding the Percentage Of Universal Service Support Provided By Federal Mechanisms And The Revenue Base From Which Such Support Is Derived

The statute requires that the Commission make existing implicit subsidies to universal service explicit. To have adopted a 25 percent allocation factor regarding the percentage of universal service support that will be provided through a federal fund flies in the face of the

statutory mandate. The 25 percent factor is to be applied from a yet to be determined cost model. Accordingly, it is impossible to determine that such a factor would in fact make existing implicit interstate universal support explicit.[14]

Further, because the cost models being developed are forward-looking models, it is a virtual certainty that the 25 percent factor will under-fund the federal universal service fund. Indeed, based on the cost methodologies that are being considered, BellSouth believes that an interstate factor of at least 40 percent is required if the Commission is to implement the statute's directives.

It is inadequate and inappropriate to shift the entire burden of universal service to the states. To do so will put significant upward pressure on the basic telephone rates of consumers in rural, high-cost areas--a result that is hardly compatible with the framework of Section 254. Indeed, an insufficient federal universal service fund would jeopardize universal service. Further, an insufficient fund will chill the development of competition in rural, high-cost areas. Such areas will not be sufficiently profitable for new entrants to provide service. Accordingly, the Commission should be extremely concerned with the impact of under-funding universal service.

With regard to the revenue base, it appears that it is assumed that the revenue base determines the source of the contributions to the universal service fund and affects the size of the fund. This is incorrect. Under the statute, the size of the fund should be independently

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[14] Indeed, in tentatively selecting a $31 revenue benchmark which includes services that are providing implicit universal service support, the federal universal service fund will most likely not even address 25 percent of the implicit support currently provided to universal service.

determined such that it is sufficient to make all implicit subsidies explicit. The revenue base is used only to determine a carrier's contribution to the fund relative to other carriers. For the federal fund, the contributions a carrier makes to the fund are interstate costs that the carrier would recover from its interstate customers. A carrier's contribution to a federal universal service fund will come from interstate charges, and hence, interstate revenues.

BellSouth has advocated the use of inter- and intra-state retail revenues as the correct revenue base for determining a carrier's relative contribution. In any event, a consistent revenue base should be used for determining contributions to both federal and state universal service funds in order to assure equity and competitive neutrality.

The potential for substantial confusion remains as long as the revenue base is seen to be related to the size of the fund. The statutory requirement regarding the size of the federal fund relates to the fund being sufficient to support universal service and that it be explicit. It has nothing to do the with revenue base. Thus, the Commission should clarify this subject in its Report to Congress.

Respectfully submitted,

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January 26, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of January 1998 served all parties to this action with a copy of the foregoing **COMMENTS** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the party listed below.

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Juanita H. Lee
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* **VIA HAND DELIVERY**